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No. 92-774

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT E. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether petitioner was properly convicted under the Travel Act, 18 U.S.C. 1952, based on his violation of a state bribery statute.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 965 F.2d 804.

JURISDICTION

The judgment of the court of appeals was filed on May 5, 1992. A petition for rehearing was denied on July 7, 1992. On September 25, 1992, Justice White entered an order extending the time for filing a petition for a writ of certiorari to and including November 4, 1992, and the petition was filed on November 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted of using interstate facilities to facilitate the bribery of a public official and conspiring to do so, in violation of 18 U.S.C. 371 and 1952. He was sentenced to 27 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals reversed his conspiracy conviction but affirmed his conviction under the Travel Act. Pet. App. A1-A26.

1. In August 1985, petitioner established an insurance business, which he called Lloyd's U.S. The business was a "Lloyd's Plan" insurer consisting of an unincorporated association of individual underwriters. In the summer and fall of 1986, five States barred Lloyd's U.S. from conducting further business within their boundaries, and by the fall of 1986, Lloyd's U.S. was experiencing severe economic difficulties. Pet. App. A2-A3.

In August 1986, Gordon Taylor, the Wyoming State Insurance Commissioner, contacted petitioner to request that Lloyd's U.S. continue a medical malpractice policy for the only neurosurgeon in Casper, Wyoming. Pet. App. A3. In April 1987, Taylor put his home in Glenrock, Wyoming, up for sale. In the same month, petitioner was attending a trade convention in Lexington, Kentucky, when he, his partner Jim Howard, and his employee Michael DePaemelaere had dinner with Taylor. During the dinner, Taylor told petitioner that he was having trouble selling his home. DePaemelaere suggested that U.S. Fiduciary

Trust Company, a company under petitioner's direction, might be able to purchase the house. Pet. App. A3-A4.

A few days later, petitioner telephoned Taylor and told him that he was interested in purchasing the house. Taylor told petitioner that he had listed the house at $100,000, but that his asking price was $105,000. Taylor offered to have the house appraised, but petitioner declined the offer and agreed to purchase the house for $105,000. Pet. App. A4, A13. Petitioner then discussed the proposed purchase with Howard, his partner, who told petitioner that the purchase was illegal because Lloyd's U.S. could not carry real estate on its financial statement. Petitioner replied that he intended to purchase the home "because he needed help in Wyoming." Pet. App. A4.

Petitioner arranged for a business associate to purchase Taylor's home without using petitioner's name. He told the associate that he "wanted to do [Taylor] a favor" and that he knew that he was going to lose $30,000 to $40,000 on the house. Pet. App. A4. Shortly after the purchase, petitioner caused nine insurance underwriting groups to file notices of intent to do business with the Wyoming Department of Insurance. In mid-1987, Taylor set up a committee to draft regulations implementing new Wyoming insurance legislation. Four of the eight members of the committee were associated with petitioner. In the same period, Taylor asked an aide to draft proposed legislation to allow "Lloyd's Plan" insurers to do business in Wyoming. Taylor was to sponsor that legislation in the Wyoming legislature. Petitioner

obtained the aide's permission for petitioner's attorney to draft the legislation. Petitioner submitted the draft legislation, but it was never introduced. Pet. App. A5.

2. On appeal, petitioner argued that to establish a violation of the Travel Act, 18 U.S.C. 1952, the government had to prove that he committed a completed act of bribery. Petitioner claimed that Wyoming law required proof of the existence of an agreement between the person offering the bribe and the person to whom the bribe was offered. Because, in his view, the government failed to show such an agreement, petitioner argued that the government had failed to establish a violation of the Travel Act.

The court of appeals rejected that claim. Pet. App. A6-A11. Instead, the court held that "[t]he Travel Act, by its express language, does not require the actual commission of the underlying state offense for conviction, but rather the use of interstate facilities in furtherance of the commission of the underlying state offense." Pet. App. A7. For that reason, the court ruled, the government had to show only that petitioner used a facility of interstate commerce in furtherance of the illegal objective of bribing an official. The court went on to hold that, in any event, Wyoming state law did not require proof of an agreement as an element of the offense of bribery. The court concluded that "[n]ot only does Wyoming law *not* require evidence of a bilateral agreement between the briber and the bribee, but such evidence would not be material to a conviction for violation of the Travel Act." Pet. App. A11 (footnote omitted).

The court also held that the government had presented sufficient evidence to support petitioner's conviction under the Travel Act.[1] In particular, the court rejected petitioner's claim that the government had to prove that he received a benefit in return for his purchase of Taylor's home. Instead, the court held that petitioner's Travel Act conviction could be upheld based on the government's proof that petitioner attempted to bribe a public official to obtain a benefit. Pet. App. A17.

ARGUMENT

Petitioner claims (Pet. 5) that the court of appeals "misconstrued the proof necessary under the Travel Act to link a person's mental state to the commission of an underlying state offense." Apparently, petitioner's contention is that the court of appeals erred in its statement (Pet. App. A7) that "[t]he Travel Act, by its express language, does not require the actual commission of the underlying state offense for conviction, but rather the use of interstate facilities in furtherance of the commission of the underlying state offense." That claim is wholly without merit.

To show a violation of the Travel Act, the government must prove that the defendant used a facility of interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," and that the

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[1] The court reversed petitioner's conviction for conspiracy to violate the Travel Act because it found that the government had not proved an agreement between petitioner and Taylor. Pet. App. A12-A17.

defendant thereafter committed or attempted to commit an act in furtherance of the unlawful activity. 18 U.S.C. 1952. The term "unlawful activity" in the Act is defined to include a number of state offenses, including bribery. See 18 U.S.C. 1952(b). Thus, as the court of appeals recognized, when the government charges a defendant with a violation of the Travel Act based on a predicate state offense, the plain language of the statute requires the government to prove that the defendant acted with the intent to promote the unlawful activity defined by state law, not that the defendant actually committed the unlawful activity.

Petitioner's contention to the contrary confuses the statutory requirement that the government prove that the defendant had the intent to promote an unlawful activity within the meaning of the phrase "unlawful activity" as used in the statute. Although the government does not have to prove that the defendant actually committed a violation of the state law that forms the predicate for a Travel Act offense, it must prove that the activity that the defendant intended to promote was unlawful under state law. See generally *United States* v. *Nardello*, 393 U.S. 286 (1969); see also *United States* v. *Jones*, 909 F.2d 533, 537 (D.C. Cir. 1990) (collecting cases). Put another way, to violate the Travel Act, a defendant must intend to perform, promote, or facilitate an activity that violates state law.

Petitioner suggests that the court of appeals departed from that principle. Petitioner further asserts that there is a conflict in the courts of appeals between those courts taking the view that petitioner ascribes to the court of appeals in this case and those

courts requiring proof that the defendant intended to promote activity that involves all of the elements of a predicate offense under state law.

Petitioner is wrong on both counts. First, the court of appeals did not suggest that the government could prove a violation of the Travel Act without establishing that petitioner intended to promote activity that was unlawful under state law. The court of appeals was careful to hold that petitioner's conduct actually violated the underlying state bribery statute. Petitioner's Travel Act conviction rested on his use of a facility of interstate commerce with the intent to commit bribery under Wyoming law. The Wyoming bribery statute provides that a person commits bribery if he "offers, confers or agrees to confer any pecuniary benefit, testimonial, privilege or personal advantage upon a public servant as consideration for the public servant's vote, exercise of discretion or other action in his official capacity." Wyo. Stat. § 6-5-102 (1977). The court of appeals examined the statute and held that it did not require proof that petitioner and Taylor entered into a formal agreement under which Taylor would use his regulatory authority on petitioner's behalf in return for petitioner's purchase of Taylor's house. Instead, the court held, petitioner's purchase for a loss of a house belonging to the Wyoming Insurance Commissioner in an attempt to obtain a favorable regulatory climate for petitioner's insurance business constituted a violation of the Wyoming statute.

Thus, the court of appeals found that petitioner had committed actions amounting to a violation of the Wyoming bribery statute. Accordingly, there is no

merit to petitioner's claim that the court of appeals upheld his conviction on proof less than that necessary to establish that he intended to commit or promote a violation of state law.

Although the courts of appeals have employed various formulations in describing the role of state law under the Travel Act, there is substantial unanimity in the courts' interpretation of that statute. Regardless of the language used, the courts agree that the government must show only that the defendant intended to promote an activity that is unlawful under a specific state law. See *United States* v. *Jones*, 909 F.2d at 537; *United States* v. *Arruda*, 715 F.2d 671, 681 (1st Cir. 1983); *United States* v. *Walsh*, 700 F.2d 846, 854-855 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *United States* v. *Dansker*, 537 F.2d 40, 47 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States* v. *Goldfarb*, 643 F.2d 422, 430 (6th Cir.), cert. denied, 454 U.S. 827 (1981); *United States* v. *DeLuna*, 763 F.2d 897, 907 (8th Cir.), cert. denied, 474 U.S. 980 (1985); *United States* v. *Bertman*, 686 F.2d 772, 774 (9th Cir. 1982). Although some older decisions from the Fifth and Seventh Circuits suggested that the government did not have to prove that the defendant promoted conduct having all the elements of a state offense, see *United States* v. *Conway*, 507 F.2d 1047, 1051-1052 (5th Cir. 1975); *United States* v. *Rizzo*, 418 F.2d 71, 80 (7th Cir. 1969), cert. denied, 397 U.S. 967 (1970), more recent decisions from those circuits have adopted the majority view. See *United States* v. *Tonry*, 837 F.2d 1281, 1282 (5th Cir. 1988) (government must prove that defendant traveled in interstate commerce with the intent to

commit bribery, in violation of a specific state statute); *United States* v. *Zemater*, 501 F.2d 540, 544 (7th Cir. 1974) (activity that defendant seeks to promote must violate the law of the jurisdiction where it occurs).[2]

Petitioner also contends (Pet. 14-22) that the government's failure to show that he received any benefit in return for the purchase of Taylor's house allowed him to be convicted based only on that purchase coupled with his "subjective intent" to obtain a benefit from Taylor. As set forth above, however, the court of appeals found that petitioner's purchase of the house in an attempt to obtain favorable regulatory treatment from Taylor constituted a violation of the Wyoming bribery statute. Petitioner has not pointed to any decision by a Wyoming court that reaches a contrary result. Thus, contrary to petitioner's contention, his Travel Act conviction rests on his use of a facility of interstate commerce to commit a violation of Wyoming law, not on his mere purchase of a house.

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[2] Petitioner's elaborate effort to construct a tripartite scheme to categorize the approaches taken by the various courts of appeals mistakenly focuses on the language employed by the courts to characterize the role of state law under the Travel Act, and not on the results in those cases. Petitioner points to no case that suggests that another court of appeals would have reached a different result in his case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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